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Supreme Court of the United States

OCTOBER TERM, 1962

No. 11

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

The brief submitted for the State of Ohio cites *Zenith International Film Corp.* v. *City of Chicago*, 183 F. Supp. 623 (D. C. N. D. Ill. 1960) as legal authority to support its contention that the film "The Lovers" is obscene. The case is the first one cited in Appellee's brief (at p. 6), and a portion of the opinion in that case is appended to the brief (at pp. 75-76). If it wished to cite and rely on the opinion of the District Court in the *Zenith* case, the Appellee was under a duty to inform the Court that the judgment was reversed on appeal, see *Zenith International Film Corp.* v. *City of Chicago*, 291 F. 2d 785 (7th Cir. 1961). The ground for reversal was that the City of Chicago had not accorded the owner of the film a "full and fair hearing". Thereafter the Chicago Board of Censors reviewed its prior decision and in August 1961 issued a permit

authorizing the exhibition of the same film that Appellant was convicted of possessing and showing. We cannot state whether Appellee's dereliction was due to ignorance or lack of candor. It is nevertheless clear that the subsequent history of the case relied on by the Appellee leads to a conclusion contrary to that for which it is cited.[1]

The Appellee's Brief discusses the questions presented by this appeal in the order set forth in our Jurisdictional Statement, and we shall comment on Appellee's arguments in that order.

Appellee's Argument with Respect to the Question (1) *Whether Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material without regard to the nature and purposes of the possession.*

As shown in the Jurisdictional Statement, at the time Appellant was convicted Section 2905.34, as interpreted by the Supreme Court of Ohio and by the Trial Court in which Appellant was convicted, punished the mere private possession of obscene material. Thereafter the Ohio Supreme Court revised its interpretation and ruled, in affirming Appellant's conviction, that possession of obscene material is unlawful only if such possesion is for a guilty or an illicit purpose. (Appellant's Jurisdictional Statement pp. 8-10.)[2] The Appellee argues that there was no change in the construction of the statute because it was

[1] Canon 22 of the Canons of Professional Ethics declares that it "is not candid or fair for the lawyer * * * with knowledge of its invalidity, to cite as authority a decision that has been overruled * * *."

[2] Judge Taft, in his dissenting opinion below, suggested that the changed interpretation of the statute "would be helpful" in

at all times capable of both interpretations (namely, that it provided for punishment of mere possession of an obscene film, and also for possession of an obscene film for an unlawful purpose) and that the two interpretations are consistent (Appellee's Brief, pp. 13, 15).[3]

We cannot agree with Appellee that the Ohio Supreme Court's ruling in *State* v. *Mapp*, 170 Ohio St. 427,[4] that Section 2905.34 of the Ohio Revised Code *does not* require a showing of wrongful purpose is consistent with its later determination that the same statute *does* require a showing of "a guilty or wrongful purpose". (*State* v. *Jacobellis*, 173 Ohio St. 22 at 27.) But if we accept Appellee's argument that the statute had both meanings (one constitutional and the other unconstitutional) the law must for that reason be held unconstitutional. This Court said in *Smith* v. *California*, 361 U. S. 147, 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. Thornhill *v.* Alabama, 310 U. S. 88, 97, 98 Cf. Stanb *v.* Barclay, 355 U. S. 313."

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avoiding a review by this Court (173 Ohio St. at p. 30). The change in interpretation, being a "device to prevent a review of the decision of the federal question", cannot defeat this Court's jurisdiction on appeal. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Patterson* v. *Alabama*, 294 U. S. 600, 602; and see, *Fiske* v. *Kansas*, 274 U. S. 380, 385-86; *Norris* v. *Alabama*, 294 U. S. 587, 590.

[3] Appellee's argument that the statute had both meanings is based on the premise. "The generic concept of *possession* includes within its ambit the species of possession for the *purpose of exhibition*" (emphasis Appellee's, Appellee's Brief at p. 13).

[4] See also *Mapp* v. *Ohio*, 367 U. S. 643 at 686.

Moreover, Appellant's conviction cannot be sustained merely because the language of the statute permits a constitutional interpretation, for the Court that tried and convicted Appellant did so under a construction that clearly is violative of the Constitution. See *Jones* v. *Opelika*, 316 U. S. 584, 600 at 603, dissenting opinion, adopted by the Court on rehearing, 319 U. S. 103 and *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 456.

Appellee's Argument with Respect to the Question (2) *Whether Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantee of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reason for believing that the material is not obscene.*

Appellee contends that the question presented and left undetermined by this Court in 1959 in *Smith* v. *California*, 361 U. S. 147 at 154, was answered in 1896 and in 1897 in *Rosen* v. *United States*, 161 U. S. 29 and *Price* v. *United States*, 165 U. S. 311. The *Price* and *Rosen* cases were prosecutions under a federal obscenity statute. In the *Price* case the Court found an indictment under the statute sufficient

> "because it does, in ~~fact, contain a charge~~ that the book was obscene, *to the knowledge of the defendant*, who knowingly and wilfully, with such knowledge, deposited in the mail and thus violated the statute. No one, on reading the third and fifth counts of the indictment, could come to any other conclusion in regard to their meaning . . ." 165 U. S. at 314 (emphasis ours).

If at all pertinent to the question under consideration, *Price* supports the claim urged in the Jurisdictional Statement that one who does not know material is obscene and has cogent reason for believing it is not, may not constitutionally be convicted under a statute punishing the dissemination of obscene material.

It does not appear that the constitutional issue under discussion was raised in *Price* or in *Rosen* and the Court did not pass on the question in either case. It may be noted that *Rosen* approved an instruction to the Jury on the issue of obscenity, based on the Hicklin rule that this Court expressly disapproved in *Roth* v. *United States*, 354 U. S. 476 (compare 354 U. S. at 489 with 161 U. S. at 43). The Court in *Rosen* also approved a ruling subsequently disapproved in *Butler* v. *Michigan*, 352 U. S. 380 (compare 352 U. S. at 383-84 with 161 U. S. at 43). Under the circumstances neither *Rosen* nor *Price* may be held to preclude plenary consideration of the constitutional questions left undecided in *Smith* v. *California* and presented here, particularly in view of the developments during the past 10 years in the law relating to censorship of speech and press.

In the instant case, the United States Customs Bureau determined that the film "The Lovers" is "not obscene". At the time Appellant received the picture, Ohio had not made any determination contrary to that of the United States Customs Bureau (whether or not it was free to do so, see *Eureka Productions, Inc.* v. *Lehman*, 302 U. S. 634). Appellant therefore had ample reason to believe that his possession and exhibition of a film imported into this country pursuant to a federal administrative determination, was not wrongful. See *Dennis* v. *United States*, 341 U. S. 494, 500, *Smith* v. *California*, 361 U. S. 147.

Appellee's Argument with Respect to the Question (3)

Whether the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court, and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

Appellee objects to a consideration of the question on the ground that "the Ohio Supreme Court was given no opportunity to pass" on it. (Appellee's brief, p. 22). The objection may be dismissed as untenable in view of the fact that the question relates to an issue that the court did in fact pass upon and that is discussed in its opinion, see 173 Ohio St. at pp. 26-28, *Whitfield* v. *Ohio*, 297 U. S. 431, 435-436 and Appellant's Jurisdictional Statement at pp. 14-15. The question was also presented to the Ohio Supreme Court in the Appellant's brief to that court (at pp. 80-81, and 89) and as noted in the Appellee's brief on this motion to dismiss or affirm (at pp. 22-23), the question was also passed on by the Trial Court and the County Court of Appeals in this case.

In his Jurisdictional Statement (at p. 16) Appellant Jacobellis submitted that the Courts below, in judging "The Lovers" obscene according to "community standards", erred in considering only the singular standards of the local community in which Appellant was tried. The Appellee suggests that Appellant is estopped from raising that point because the evidence presented by Appellant related only to the standards prevailing in the County of Cuyahoga (Appellee's Brief pp. 11, 27-28). The record below reveals that the evidence submitted by Appellant was not limited to standards of the local community. While witnesses from

Cuyahoga County testified, their testimony was not restricted to the standards of that county.[5] The Record also shows that Appellant relied heavily on evidence of acceptance and commendation of the film by the motion picture critics of other areas, and caused the critics for The Saturday Review and the New York Herald Tribune to testify by deposition.

Appellee's Argument with Respect to the Question (4)

Whether Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment.

Appellee argues that the indictment in this case used the phrase "on or about" November 13, 1959 and the convictions *may have been* for two separate offenses, namely possession on November 10 and exhibition on November 13 (Appellee's Brief, pp. 29-30). Though not articulated, the argument presumably is that if Appellee's construction of the indictment is accepted, there is no need to decide the federal question presented. The short answer is that the Court of Appeals below did not accept Appellee's interpretation of the indictment and decided the federal question on the merits, 175 N. E. 2d 123, 124; and it may be assumed that the affirmance of the Court of Appeals decision by the Ohio Supreme Court was also an affirmance of that disposition of the question.

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[5] See, for example, the testimony of Dr. Richard W. Wallen, psychologist (at R. 716-19, 726-28) and of Reverend Peter H. Samson (at R. 796-98). The references are to the pages of the Bill of Exceptions included in the Record on Appeal from the Court of Common Pleas. The pagination referred to is in the upper right hand corner of each page.

Appellee's Argument with Respect to the Question (5) *Whether Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.*

Question 5 was first presented on the argument of a demurrer to the indictment, renewed in the Trial Court, argued in the intermediate Appellate Court, included in the assignments of error to the Ohio Supreme Court, and was briefed by both parties. The issues are also "fairly comprised" in Question 3 of Appellant's Notice of Appeal herein, which includes among the questions presented the question of whether Appellant was "deprived . . . of equal protection of the laws and of due process of law . . . ".

The elaborate arguments presented at pp. 31-37 of Appellee's brief to show that the Ohio statutory scheme is not discriminatory do not require detailed rebuttal here. Suffice it to say that the Appellee's citation (at p. 36 of its brief) of *State ex rel.* v. *Thrasher*, 130 Ohio St. 343 is illustrative. Though cited for the proposition that the Ohio constitution does not preclude reasonable classification, *Thrasher* held that an excise tax discriminating in favor of certain bondholders was unreasonable and therefore void under the Ohio constitution.

Conclusion.

The motion to dismiss the appeal or in the alternative to affirm, should be denied because the appeal presents a number of substantial federal questions timely and properly raised. The judgment of the Court below should therefore be reviewed, and the issues presented should be given plenary consideration.

Respectfully submitted,

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August 16, 1962

On the Brief

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